IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as MORRIS & LOWTHER; H. M. HEWITT and LEW NUNAMAKER, doing business as JOHN DAY VALLEY FREIGHT LINE; H. L. LIVINGSTON, doing business as BEND-PORTLAND TRANSIT, and PORTLAND-HOOD RIVER TRUCK LINE, INC., *Appellants,*

vs.

WM. DUBY, H. B. VAN DUZER, and W. H. MALONE, as the OREGON STATE HIGHWAY COMMISSION, *Appellees.*

Appeal From the District Court of the United States From the District of Oregon.

MOTION TO VACATE DECREE AND BRIEF IN SUPPORT

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors for Appellants.

PIGOTT PRINTING AND FILM CO., SEATTLE

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the appellants in the above entitled cause and move this Honorable Court to vacate that

certain decree made and entered October 29, 1926, in the above entitled cause and show as follows:

1.

That as shown by the transcript of record in this Court a judgment and decree was entered in the lower Court on March 20, 1926, and in which judgment and decree the defendants, now the appellees, recovered their costs and disbursement taxed in the sum of $30.00 and the execution issue therefor. (P. R. 25, 26.)

That on said day proper appeal was prayed for and perfected to this Court. (P. R. 26, 27.)

That on said day, to-wit, March 20, 1926, the said order entered by the appellees herein reducing the combined weight of truck and load from 22,000 pounds, as shown in the record, was still in force and effect. (P. R. 3.)

It is shown that said order was entered by said appellees herein under and by virtue of the provisions of Sections 35 and 36 of the Law of Oregon 1921, and that the only power to so act by said appellees was claimed under such sections of said State Law. (P. R. 8.)

That the appellants received notice some time after April 1, 1926, that the said appellees had, after the appeal from the said judgment of the lower Court had been perfected herein, revoked the order of the said appellees in which the said combined weight of truck and load had been reduced from 22,000 pounds to 16,500 pounds, and in the answer to the petition for

a stay in the above entitled cause filed herein, it is alleged that on March 25, 1926, such order had been revoked, and such order also revoked all of the restrictions on the other 14 primary highways. Such order being made by said appellees 5 days after the appeal herein had been perfected, and jurisdiction vested in your Court.

The order in controversy herein showed that the said appellees acted under and by virtue of the laws of Oregon for 1921, as amended in 1921, Special Session, all as set out in said order, a copy of which is set out in full in the transcript of record herein. (P. R. 15-17.)

That on the 27th day of September, 1926, the briefs of the appellants herein were mailed at Seattle, Washington, to the Supreme Court in the above entitled cause, and at the same time briefs were mailed to the Attorney General at Salem, Oregon, in the above entitled cause.

That on the 28th day of September, 1926, the appellees herein, acting solely under the provisions of Sections 35 and 36 of the said State Law, as amended, did enter another order (which effects the same) 14 of the primary highways of the State, all Federal aided, restricting the use of motor trucks on certain portions of said highways, including the 22.11 miles on the Columbia River Highway between the East Multnomah County Line and Hood River, in which order the appellees reduced the combined weight of truck and load from 22,000 pounds to 16,500 pounds, but declared that such reduced weight should only affect trucks having solid tires, and permitted trucks with pneumatic tires to carry the legal combined weight of 22,000 pounds and with a speed of not over 18 miles per hour, while the speed of the same truck

with solid tires is limited to a speed of 12 miles per hour.

That these appellants and others, operating trucks with combined weight of truck and load of 22,000 pounds were and are compelled to use solid tires and pay the said 50 cents per inch on such tires, and such order, so made on September 28, 1926, was not made by reason of any emergency, but fixed a definite time of restriction, to-wit, from October 15, 1926, to April 15, 1927, and said order of said September 28, 1926, as far as these appellants are concerned, has the same force and effect as the said order complained of entered in 1925.

That the specifications of errors contained in the brief of appellants show that the principle questions for determination was the constitutionality of such provisions of the State Law, being Sections 35, 36, and 36A, and the order entered by the appellees in 1925 rested entirely upon the constitutionality of the law vesting the appellees with the jurisdiction and power to enter such order.

Also that interstate commerce was unconstitutionally burdened by such provisions of the said State Law as so administered. (Brief pp. 16, 17.)

So this Court will find that the appellants directly attacked the constitutionality of said Sections 35 and 36 of said State Law, in paragraph 11 of the argument. (Brief p. 30.)

The amended complaint attacked the constitutionality of said sections of said law. (P. R. 13, 15.)

Wherefore these appellants pray this Honorable Court to vacate and set aside the said order dismissing said appeal entered on the 29th day of October, 1926; and vacate the order and decree herein; and further these appellants again renew their application made for a Stay applied for in this Court on May 24, 1926; and for all proper and further relief in the premises.

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors for Appellants.

ARGUMENT

The record shows that the appellees, immediately after the appeal had been perfected to this Court, had entered an order revoking such order reducing the combined weight of truck and load. The appellants made application in May to this Court for a stay order, or the advancement of the hearing on the appeal. In answer to such petition the appellees filed an answer, and in such answer they show that their order had been revoked and desired the dismissal of the appeal.

As soon as the appellants had served the appellees with their brief, the appellees again made an order with the same force and effect as the order in 1925 which is set out in this cause as exhibit "A" to the amended complaint. Such new order was made September 28, 1926.

This Court on October 29, 1926, entered a decree dismissing the appeal with instructions to the lower Court to dismiss the bill of complaint on the ground that the case had become a moot one through the rescission of the assailed order of the Oregon State Highway Commission, with leave given appellants to move to vacate such decree.

This Court inadvertently overlooked the principle matter involved in the appeal. That is, that this action was instituted for the purpose of testing the constitutionality of Sections 35, 36, and 36A of the Law of 1921, as amended. The appellants made such question the material question, as without such provisions of said State law, the said State Highway Commission

had no power to enter the order of 1925. We consider that if there was nothing else contained in said amended bill of complaint, except the question of the constitutionality of said provisions of said State law, we are entitled to have this Court pass upon such question. This Court in its decree of dismissal only considered the revoking of the said order without considering the basis upon which said order was issued by the appellees.

Again, the appellees themselves have endeavored to prevent a review of the constitutionality of said Sections 35 and 36 of the Laws of 1921, as amended, by revoking their order after the appeal had been perfected to this Court, and thereafter praying this Court to dismiss such appeal, and then on September 28, 1926, the appellees entered another order and again reduced the said combined weight of trucks and loads of these appellants and others, and these appellants are in the same position they were in when said appeal was perfected on March 20, 1926. We venture to say that if we should institute another action similar to the one instituted by these appellants in the fall of 1925, and the matter should come on for hearing, and if these appellants would perfect an appeal, these appellees would again revoke such order made this year, and again this Court would be asked to dismiss the appeal as a moot one.

Fortunately, your Court has had the opportunity to examine into situations of this kind, and we call this Court's attention to the following cases:

This Court in its opinion delivered by Mr. Justice Peckham said:

> "As to the first ground, we think the fact of the dissolution of the association does not prevent this court from taking cognizance of the appeal and

deciding the case upon its merits. The prayer of the bill filed in this suit asks, not only for the dissolution of the association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing, or combining and acting together to maintain rules and regulations and rates for carrying freight upon their several lines, etc. The mere dissolution of the association is not the most important object of this litigation. The judgment of this court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked, not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future. * * * *

As an answer to the fact of the dissolution of the association, it is shown on the part of the government that these very defendants, or most of them, immediately entered [illegible] a substantially similar agreement, which [illegible] remain in force for a certain time, and under which the companies acted, and in regard to which it does not appear that they are not still acting.

If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants have succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a

similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow.

United States v. Trans-Missouri Freight Association, 166 U. S. 290, 308, 41 L. ed. 1007, 1016.

Again, this Court announced the same principle in the opinion delivered by Mr. Justice McKenna:

"But in those cases the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in *United States v. Trans-Missouri Freight Asso.,* 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and *Boise City Irrig. & Land Co. v. Clark* (C. C. App. 9th C.) 65 C. C. A. 399, 131 Fed. 415.

In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress."

Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U. S. 498, 515, 55 L. ed. 310, 316.

Further Mr. Chief Justice Taft said in delivering the opinion in the following case:

> "The second ground urged for dismissal is that the tax for 1919, sought to be enjoined, has been collected from the taxpayers of the City by the Treasurer of the Commonwealth, so that the case has become a moot one. But the tax had been paid before the Supreme Judicial Court took up, considered, and decided the case. It must, therefore, have found, as it was entirely justified in doing, that the bill, in its averments, prayer, and real object was directed not only against the collection of the tax pending, but against future payments out of the treasury of the commonwealth, and against the continued operation of the Trustees under the Statute of 1918."

Boston v. Jackson, 260 U. S. 275, 313, 67 L. ed. 274, 281.

Mr. Justice Holmes said, in delivering the opinion of this Court:

> "Perhaps it should be added to the foregoing statement that the bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill or the appeal on that ground, because to be enabled to cast a vote in that election is not, as in *Mills v. Green*, 159 U. S. 651, 657, 40 L. ed. 293, 295, 16 Sup. Ct. Rep. 132, the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff."

Giles v. Harris, 189 U. S. 474, 484, 47 L. ed. 909, 911.

We earnestly pray that this Court should vacate the decree of dismissal, and the constitutionality of such provisions of said State law should be decided, and in addition that from the record presented in this Court, the appellees should be restrained from proceeding in any manner under Sections 35 and 36 of said law of 1921, as amended, until the final determination of the constitutionality of such sections of said law; and for such proper relief in the premises.

Respectfully submitted,

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors for Appellants.